No. 83-1728

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In The

Supreme Court of the United States

October Term, 1983

HOME BOX OFFICE, INC. and SHOWTIME ENTERTAINMENT CORPORATION,

Petitioners,

vs.

CRIMPERS PROMOTIONS INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JERRY I. LEFKOWITZ
Attorney for Respondent
116-55 Queens Boulevard
Forest Hills, New York 11375
(212) 261-5251

0395
Byte Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1141 • DC (202) 783-7288 • USA (800) 5-APPEAL

QUESTION PRESENTED

1. Does the *Associated General* decision prevent the respondent from having standing to bring an antitrust suit in the case at bar wherein the respondent, which was organized to produce, manage and operate a cable television trade show in order to provide a forum for independent producers and suppliers of Cable Television Programming, brought an antitrust suit against the petitioners by reason of the fact that the petitioners conspired together to boycott the respondent's trade show directly and used coercive tactics to force their suppliers and competitors to similarly boycott said show which resulted in direct harm being sustained by the respondent?[1]

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1. The respondent is dissatisfied with the question presented by the petitioners and offers the within question as the real question at issue in the case at bar.

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RESPONDENT'S BRIEF IN OPPOSITION

Crimpers Promotions Inc. ("Crimpers"), the respondent in the above mentioned proceeding, respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 12, 1983 brought by the petitioners, Home Box Office, Inc. ("HBO") and Showtime Entertainment Corporation ("Showtime"). The respondent is satisfied with the presentation by the petitioners of the list of parties, the citations to the opinions and judgments delivered in the courts below, the statement of the grounds on which the jurisdiction of this Court is invoked and the citations and quotations of the statutory provisions involved.

STATEMENT OF THE CASE

The statement of the case presented by the petitioners unfairly and improperly fails to analyze the relationship which Crimpers had to HBO and Showtime and the effect that Crimpers had upon the decision of HBO and Showtime to boycott and sabotage CATEL. Instead, HBO and Showtime merely attempt to analyze the levels in the alleged distribution chains of Cable Television Programming in order to convince this Court that Crimpers is not a participant in any level of the alleged distribution chain which allegedly automatically excludes Crimpers from having standing to bring the within lawsuit. It is for these reasons that a counterstatment of the case must be submitted by Crimpers so that this Court will have the appropriate statement to apply in making a determination that the petition of HBO and Showtime must be denied in all respects.

Crimpers is a New York corporation organized in 1980 which was formed for the initial purpose of producing, managing and operating a cable television trade show known as CATEL EXPO - PROGRAMMING SOURCES '81 ("CATEL") which was held in the Las Vegas Hilton Convention Center from September 25-27, 1981 in addition to other ventures. The trade show was to be the first all-programming, conference and exposition in the Cable Television Industry and was formed and produced in order to develop a national and international market place for Cable Television Programming of all types and kinds (App. D at 3d).[2] The trade show was to provide a forum in which independent producers and suppliers of Cable Television Programming could meet and transact business with prospective purchasers of such programming, such as cable television networks. The term "Programming" as conceived in connection with said show is defined in paragraph 6(d) of the complaint (App. D at 3d) and essentially consists of anything the Cable System Operator can sell for a profit to the community he serves. There was no other show ever conceived prior to the conception of CATEL EXPO which had as its sole purpose an international market place for programming of all types.

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2. All references to the Appendix in this brief are references to the Appendix presented by the petitioners.

HBO and Showtime are two of the leading companies in the Cable Television Industry. Both HBO and Showtime purchased programming from independent producers and suppliers and packaged said programming into a complete network format for sale to Cable System Operators. The Cable Operators, in turn, transmit the HBO and Showtime network programming to their home television subscribers. In fact, HBO and Showtime are the dominant forces in the Cable Pay-Television Industry with thousands of affiliate networks and over ten million subscribers throughout the United States (App. D at 4d-5d).

Crimpers had rented 80,000 square feet of exhibit space to be filled by 350 booths in the Las Vegas Hilton Convention Center and expected that 5,000 or more persons would attend.

HBO and Showtime immediately got together in a concerted effort to sabotage and boycott CATEL. The sole reason for said boycott and sabotage was that both HBO and Showtime were desirous of preventing a show from taking place that would bring the independent programmer and buyer together so that they would not have to go to the central sources (HBO and Showtime). In other words, HBO and Showtime boycotted and attempted to ruin the trade show produced by Crimpers for fear that its success would provide a forum in which independent buyers and sellers of cable programming could transact business face-to-face which would result in reducing or eliminating the economic power of HBO and Showtime in the Cable Television Industry. HBO and Showtime recognized that at the show produced by Crimpers, the Cable System Operator would be able to get its own programming without having to go through Showtime or HBO which required that said operator actually purchase a full network of programs in order to obtain a specific item. In this manner, HBO and Showtime would no longer be in a position to act as middlemen in the Cable Industry, purchasing large amounts of programming from independent producers at artificially low prices, arranging the program into a network format, and then reselling it as a package at artifically high prices to cable networks for transmission to subscribers. In fact, Crimpers alleges in its complaint that independent buyers and sellers of programming are kept from trading on a "stand-alone" basis because of the power of HBO and Showtime as middlemen (App. D at 5d, 9d,

13d). Crimpers was, therefore, acting as an agent or broker of the producer of a small film by giving them a forum to sell their films to the Cable System Operator and, therefore, skipping over the monopolistic middlemen, HBO and Showtime.

HBO and Showtime immediately began a campaign to sabotage the show and did the following things to accomplish their boycott:

1. HBO and Showtime, after expressing their initial interest in CATEL, decided to withdraw from participation.

2. HBO and Showtime acted together and agreed that they would inform all small producers that if they exhibit or attend CATEL, Showtime and HBO would not buy their programming even at the normally low prices which had become the standard in the industry due to the monopolistic practices of HBO and Showtime (App. D at 9d).

3. Each defendant issued letters, memoranda and made phone calls to various independent programming and system operators throughout the Cable Television Industry to inform them that they should not appear at CATEL (App. D at 8d).

4. Showtime and HBO jointly and separately called the show a rip-off and a scam and a fraud and informed people that Crimpers would run away with the monies received as and for the rental of booths from exhibitors at said show, and additionally informed all persons with whom they came in contact that the show was undercapitalized and it was asking too much money up front from exhibitors (App. D at 8d).

5. A gentleman named Robert Schultz, of Video Probe Index, indicated that he would not help organize the conference portion of CATEL after he had verbally agreed to do so by reason of the fact that he stated that intense pressure was placed upon him by certain power people in the Cable Television Trade Associations which included HBO and Showtime.

6. HBO and Showtime contacted and informed industry consultants and others who were planning to assist Crimpers in

the development of its show that if they did not back out of their plans to support the show, they would suffer consequences that would destroy their respective businesses (App. D at 9d-10d).

HBO and Showtime have reduced competition in the markets for the sale and purchase of programming for cable television and have prevented independent producers and suppliers from transacting business with potential purchasers on a stand-alone basis at trade shows like the one organized by Crimpers. Prior to the conspiracy and boycott created by HBO and Showtime, Crimpers anticipated that more than 250 companies would participate in its trade show. As a result of the actions of HBO and Showtime, less than 200 people appeared at said trade show and only 55 companies were exhibitors at said trade show, occupying fewer than 100 of the available 350 booths. Crimpers was unable to obtain sufficient exhibitors and attendees for its trade show, continues to be unable to do so and has been forced to cease business solely and only as a result of the acts of HBO and Showtime.

Crimpers was the actual target and directly injured by the activities of HBO and Showtime and, therefore, brought the within lawsuit. Thereafter, HBO and Showtime moved to dismiss Crimpers' Sherman Act Section 1 and 2 claims on the ground that Crimpers lacked antitrust standing to sue for treble damages pursuant to Clayton Act Section 4. In addition, the defendant moved to dismiss the various state law claims included in the complaint. Judge Sand in the District Court denied the motion except for the tying claim and some of the state law claims. The District Court then certified its decision for interlocutory appeal and the Court of Appeals granted leave to appeal, which appeal was subsequently denied.

SUMMARY OF ARGUMENT

The writ requested herein should be denied. In the first place, the decision below does not conflict directly with this Court's ruling in *Associated General Contractors, Inc. v. California State Counsel of Carpenters*, 103 S. Ct. 897 (1983). The lower court quite properly recognized that "the *Associated General* opinion . . . simply cited the 'target area' test as one of many,

103 S. Ct. at 907 n. 33" and "advised the Courts to abstain from black letter rules and to analyze the facts in each case." (*See* App. A at 7a.) The *Associated General* opinion recognized that issues of "standing" are extremely fact-sensitive and set up various criteria and tests which must be considered in determining whether or not a particular plaintiff has standing to bring an antitrust claim. As will be developed later in this brief, Crimpers meets every one of the criteria to affirmatively establish that it has standing to bring its claim herein as was recognized by the lower court. In this regard, Crimpers is not in the same position as the unions were in the *Associated General* case and it is, therefore, evident that Crimpers has standing to assert its antitrust claims.

In the second place, the case at bar does not conflict with and is distinguishable from the Seventh Circuit decision in *Bichan v. Chemetron Corp.*, 681 F. 2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983) or the decision rendered in this Court vacating a Ninth Circuit decision granting standing in the case of *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F. 2d 1378 (1982). The courts in the *Bichan* and *Ostrofe* cases were dealing simply with a different set of facts than is applicable in the case at bar and cases involved antitrust standing are extremely fact-sensitive. The lower court did not create any conflicts in determining that standing exists herein as is alleged by HBO and Showtime in their brief, but instead applied the criteria and tests developed by the *Associated General* decision in determining that standing exists in the case at bar.

Crimpers was the victim of the conspiracy of HBO and Showtime to boycott CATEL directly and to use coercive tactics to force their suppliers and competitors to similarly boycott said show. In the within case, the conspiracy of HBO and Showtime was directed at Crimpers and no other person. HBO and Showtime effectively took direct aim at Crimpers and its trade show and, therefore, was the clearly identifiable target against whom HBO and Showtime aimed their conspiracy. It is the argument of Crimpers, as was adopted by the lower court, that Crimpers was a target which was sufficiently connected to the unlawful behavior of HBO and Showtime so as to have standing under Section 4 of the Clayton Act.

In fact, the injuries to Crimpers were clearly foreseeable by HBO and Showtime when they undertook their conspiracy and boycott.

Crimpers has alleged and the lower courts have properly agreed that a plaintiff need not be a direct competitor in the market in which HBO and Showtime operate and the fact that Crimpers does not directly compete with HBO and Showtime in the purchase and sale of cable programming is, therefore, not dispositive. Crimpers was no mere supplier or customer or employee only tangentially related to the goal of the conspiracy of HBO and Showtime. In the *Associated General* case, the Union was only tangentially related to the goal of the conspiracy and was far removed from the nature of the conspiracy. In the case at bar, Crimpers was the entity against whom the conspiracy took direct aim and was the direct victim of said conspiracy. The *Bichan* and *Ostrofe* cases deal with a former employee who refused to participate in a boycott or a conspiracy and was thereby forced to resign as a result of his refusal. There are no facts in the Crimpers case which are analogous to the fact patterns existing in either *Bichan* or *Ostrofe*.

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S *ASSOCIATED GENERAL* CASE IS NOT APPLICABLE TO THE CASE AT BAR AND THE CRITERIA ESTABLISHED THEREIN FOR ANTITRUST CASES ARE SATISFIED IN THE CASE AT BAR.

HBO and Showtime allege that the decision in the court below conflicts with the *Associated General* ruling. Crimpers has always asserted that there is no such conflict whatsoever and has recognized that *Associated General* merely created a list of criteria to be utilized in determining whether or not standing actually exists.

In *Associated General*, the plaintiffs were construction-trade labor unions (hereinafter referred to as the "Union") which sued a contractor's association composed of various building and construction contractors. The Union represented more than 50,000 individuals employed by the defendants in the carpentry, drywall, pile driving and related industries throughout the State of California. The Union alleged that the defendants had conspired to coerce General Contractors to use non-union subcontractors and also had conspired to coerce real estate owners to use non-union contractors and subcontractors. The question before the Court in the *Associated General* case was simply whether or not the Union was a proper party to bring an antitrust action. It is true that standing was denied in the *Associated General* case, but said denial supports the argument that the issue of "standing" in antitrust cases is an extremely "fact-sensitive" issue. In fact, the Court in the *Associated General* case recognized the fact that the issue of "standing" is extremely fact-sensitive when said Court held that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Id.* at 908.

More important is the fact that the *Associated General* case was a class action on behalf of numerous affiliated local unions and district councils.

The Court in the *Associated General* case even went so far as to recite the observation made by the District Court in said case, that "the Complaint alleged 'a rather vague, general conspiracy,' and that the allegations 'appeared typical of disputes a Union might have with an employer,' which in normal course are resolved by grievance and arbitration or by the NLRB." *Id.* at 901. The Court in *Associated General* was involved with a unique situation where a union was a plaintiff and the Court relied heavily on that particular aspect of the case in denying "standing." The Union was an incidental or a collateral victim of alleged anti-competitive activities directed elsewhere. In the case at bar, Crimpers alleges that the anti-competitive activity was directed at Crimpers. The means to effectuate it is the pressure on the third parties, *i.e.*, the suppliers of programming and Cable Systems Operators. This Court stated in *Associated General* that the complaint in said case did not describe an antitrust violation as does the complaint in the case at bar. In fact, this Court distinguished the *Associated General* case from the case at bar when it stated that no antitrust claims were asserted in the *Associated General* case in the following manner:

> "At common law — as well as in the early days of administration of the Federal Antitrust Laws — the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade. Federal policy has since developed not only a broad labor exemption from the antitrust laws but also a separate body of labor laws specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, supra, 429 U.S. at 487-488. In this case, particularly in light of the long standing collective bargaining

> relationship between the parties, the union's labor-market interests seem to predominate and the *Brunswick* test is not satisfied." *Id.* at 909-910.

More importantly, in the *Associated General* case, there were various links contained in the chain of causation between the Union's injury and the alleged restraint in that the Union claimed that the defendants applied coercion against landowners and other contracting parties in order to cause them to divert business from certain union contractors to non-union contractors. *Id.* at 910. In the case at bar, there is a much greater degree of directness, in that it was the intention of HBO and Showtime to cause injury to Crimpers so that sellers of programming on a stand-alone basis would not be able to meet at the trade show promoted by Crimpers. This Court noted in *Associated General* that the damages claimed by the Union in said case were highly speculative in the following manner:

> "Partly because it is indirect, and partly because the alleged effects on the union may have been produced by independent factors, the Union's damages claim is highly speculative. There is, for example, no allegation that any collective bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members had declined, and no allegation that the union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott. . . . Other than the alleged injuries flowing from breaches of the collective bargaining agreements — injuries that would be remediable under other laws — nothing but speculation informs the union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, it is appropriate for

> Section 4 purposes 'to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.' " *Id.* at 911.

Conversely, in the case at bar, the damages sustained by Crimpers are not speculative. Crimpers specifically alleges that it was damaged in that only a handful of exhibitors appeared at its trade show when it had originally sold a great portion of its exhibit booths. Crimpers alleges that it was effectively destroyed as a result of the conspiracy and boycott created by HBO and Showtime and that its revenues were substantially decreased as a result thereof and that there is a much greater degree of definiteness in the damages sustained by Crimpers than that which were sustained by the unions in the *Associated General* case.

This Court held as follows with respect to damages in *Associated General*:

> "In this case, if the Union's Complaint asserts a claim for damages under Section 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent the coerced firms diverted business away from union contractors, and then to what extent the subcontractors absorbed the damage to their businessses or passed it on to employees by reducing the work force or cutting hours or wages. In turn, it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues." *Id.* at 912.

In addition, this Court in the *Associated General* case held that the "Union's allegations of consequential harm resulting from a violation of the antitrust laws . . . are insufficient as a matter of law" and "other relevant factors — the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged

injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy — weigh heavily against judicial enforcement of the Union's antitrust claim." *Id.* at 913.

The lower court in the case at bar, however, recognized that the damage claim of Crimpers is not speculative at all when the lower court stated that the expenses of Crimpers "in preparing CATEL are easily determinable, and its expected profits from this and future shows should be provable under the liberal principles long recognized in antitrust cases." (*See* App. A at 14a.)

A review of the specific factors and criteria enunciated by this Court in *Associated General* as applied to the case at bar will reveal that the court below did not commit any error whatsoever in deciding that Crimpers had "standing" to assert its antitrust claims and, therefore, the decision below does not conflict with this Court's *Associated General* ruling. Crimpers' complaint does stand the test against the factors enunciated by this Court in *Associated General* which are determinative of the issue of "standing."

A. Crimpers' injury was inextricably interwined with the injury HBO and Showtime sought to inflict on the programming market.

One of the first factors enunciated in the *Associated General* case was that the victim of the antitrust violations had to be injured by the defendants' conspiracy to restrain competition in a particularly relevant market.

In this regard, it is repectfully submitted that the Court is to be guided by this Court's case of *Blue Shield of Virginia, et al. v. McCready*, 457 U.S. 465, 102 S. Ct. 2540 (1982). The *McCready* case is strikingly similar to the case at bar. In the *McCready* case, the plaintiff brought suit under the antitrust laws alleging that Blue Shield and the State Psychiatric Society had engaged in an unlawful conspiracy to exclude psychologists from receiving compensation under Blue Shield's Health Benefits Plan. Under its Plan, Blue Shield reimbursed subscribers for part of the cost of outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield only reimbursed

subscribers for treatment by psychiatrists and not for services provided by psychologists unless treatments were under the supervision of a physician. The plaintiff in the *McCready* case, like the plaintiff in the case at bar, was alleged to be a person outside the market in which the defendants operated. It is well to note that in the within case, HBO and Showtime were involved in the trade show portions of the Cable Television Industry and Crimpers was also involved in the sale of programming in said industry which consisted of one of its other ventures which it alleged to exist in the complaint herein (App. D at 3d, 17d-18d). However, both McCready and Crimpers were the entities against whom the defendants in each case took aim. In fact, as was noted in *McCready*, "the injury McCready suffered was inextricably intertwined with the injury the conspirators sought to inflict on the psychologist and the psychotherapy market." *Id.* at 2555 in Supreme Court Reporter. Similarly, in the *Crimpers* case, the injury Crimpers suffered was so firmly connected with the injury HBO and Showtime sought to inflict on the programming market that Crimpers is firmly associated in the market to the extent that antitrust standing should be permitted.

Judge Sand in writing for the District Court in the case at bar recognized that "at a minimum, it now seems clear that, as a rule, a plaintiff need not be a direct competitor in the market in which the defendants operate . . ." (App. B at 11b). In analyzing the decision of Mr. Justice Stevens in the *Associated General* case, Judge Friendly, in writing for the Court of Appeals in the case at bar, in discussing the factor of relevant market, held as follows:

> ". . . Justice Stevens relied on his discussion of the legislative history to support the conclusion that 'the Sherman Act was enacted to assure customers the benefit of price competition,' id., and went on to state that 'our prior cases,' including *McCready* 'have emphasized the central interest in protecting the economic freedom of participants in the relevant market,' id. at 909 (footnote omitted). Whereas *McCready* was a direct victim of defendants' conspiracy to restrain competition by psychologists with psychiatrists, the

> union's harm resulted from defendants' efforts to thwart its objective of excluding non-union labor and this was a 'labor-market' rather than an antitrust injury. Here, Crimpers claims to be a victim of HBO's and Showtime's conspiracy to prevent direct dealing between producers and television stations by boycotting CATEL." *See* App. A at 12a-13a.

Judge Sand, therefore, properly held that "the fact that Crimpers does not directly compete with the defendants in the purchase and sale of Cable Programming is, therefore, not dispositive" since "McCready herself did not compete with the psychiatrist alleged to have conspired with Blue Cross to restrain trade in the psychotherapy market." (App. B at 11b). HBO and Showtime would like this Court to believe that the destruction of CATEL was only a means by which HBO and Showtime sought to restrain trade. However, in the *McCready* case, the refusal to reimburse subscribers for psychology services was also nothing more than a mere means to further the defendants' goal of reducing competition in the market for psychotherapy services.

It is, therefore, evident that Judge Friendly was correct in his final analysis of the case at bar when he held as follows:

> "In sum, despite the able presentation by defendants' counsel, we are unconvinced that the victim of a successful boycott designed to support a broad policy of market limitation lacks standing under Section 4 simply because the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without paying tribute to the defendants. The contrary view would run counter not only to the two most recent decisions of the Supreme Court, but to elementary common sense. Indeed, if we should free ourselves from the miasma of adjectives that has accumulated around the words of Section 4, this case would seem to be a paradigm of standing" (App. A at 14a-15a).

Other cases which similarly extend the relevant market rule to cases similar to the case at bar are *Aurora Enterprises, Inc. v. National Broadcasting Company Inc., et al.*, 688 F.2d 689 (9th Cir. 1982) and the Second Circuit case of *Western Geophysical Co. v. Bolt Associates, Inc.*, 584 F.2d 1164, 1165 (1978).

There is no doubt but that Crimpers is an entity in the area of the economy threatened by the anti-competitive conduct of HBO and Showtime and that Crimpers, therefore, fits within the test enunciated by the Second Circuit in the case of *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785 (1983).

It is, therefore, evident that Crimpers satisfies the *Associated General* criterion that the plaintiff be a participant in the relevant market.

B. Crimpers would clearly benefit by enhanced competition in the target market.

A second factor which was enunciated in the *Associated General* case was whether or not the interests of the plaintiff would be served or disserved by enhanced competition in the market. Certainly, in the case at bar, Crimpers would clearly benefit by enhanced competition in the target market. The increased competition in the target market would aid Crimpers by reason of the fact that Crimpers had full intention of conducting its all programming conference and exposition in the Cable Television Industry for many years to come and it had further intentions of being involved in other businesses which would have been directly related to its show. Certainly, Crimpers would have benefited by the enhancement of the ability of independent programmers to make more money. If competition was enhanced in the programming market. HBO and Showtime would have been required to pay larger sums for programming instead of the low prices they currently pay. The payment of larger sums as and for programming by the two major purchasers of programming would have resulted in the programming community becoming a richer, more viable community which would have been able to spend larger sums of money at CATEL, both in its initial year and in the years to come. However, said benefits could not be derived by Crimpers due to the actions of HBO and Showtime.

However, as set forth so vividly by the Supreme Court, the goal of the Union in the *Associated General* case is essentially to increase the earnings and improve the working conditions of its membership and the Court noted, at page 909 of its decision, that said goal may not be necessarily served and, in fact, may actually be harmed if competition is uninhibited.

It was the goal of Crimpers to enhance competition in the programming market by conducting a trade show for the benefit of persons who were selling programming on a stand-alone basis and it is, therefore, respectfully submitted that Crimpers would have clearly benefited by the enhanced competition resulting therefrom. It is, therefore, evident that in the case at bar the second factor enunciated in the *Associated General* case was fully satisfied in order to support the lower court's determination that "standing" exists herein.

C. Crimpers' injuries are directly related to the antitrust violations of HBO and Showtime.

A third factor considered by the *Associated General* Court was the directness or indirectness of the asserted injury. In the *Associated General* case, the Court noted on page 910 that "the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contain several somewhat vaguely defined links." In said case, the plaintiff alleges that the defendants applied coercion against certain land owners and other contracting parties in order to cause them to divert business from certain union contractors to non-union contractors and the Union's complaint alleged only unspecified injuries in its "business activities." *Id.* at 910. The Court noted in *Associated General* that "any such injuries were only an indirect result of whatever harm may have been suffered by 'certain' construction contractors and subcontractors." *Id.* at 910. The *Associated General* case held that it was the construction contractors or subcontractors who had the right to maintain their own treble damage actions against the defendants.

In the within case, HBO and Showtime assert that Crimpers' damages are derivative in nature and only indirectly related to the alleged violation. However, as noted by Judge Sand, Crimpers'

injuries are "far more direct and easier to ascertain then those incurred by any one of defendants' direct competitors." (App. B at 11b). Crimpers has alleged that solely as a result of the actions of Showtime and HBO, certain specific companies which had intended to attend Crimpers' trade show decided instead to boycott it. Judge Sand quite properly noted that "By contrast, one of defendants' direct competitors in the purchase of cable programming (who, according to defendants, would have standing to sue) would have a more difficult time quantifying the harm it incurred on account of an overall reduction in competition." (App. B at 11b-12b). In fact, Judge Sand went on to further state that "it is Crimpers' damages, not those of defendants' direct competitors, that are direct and quantifiable in this case." (App. B at 12b).

Judge Friendly in the decision of the Court of Appeals in the case at bar analyzed both the *McCready* and *Associated General* rationale with respect to the remoteness and indirectness of the claimed injuries.

Judge Friendly analyzed the *McCready* test of remoteness as adopted by Mr. Justice Brennan of the within Court in the following manner:

> "Justice Brennan then turned to the second limitation, which he characterized as the 'conceptually more difficult question' whether the injuries were 'too remote' from the antitrust violation to afford standing. 102 S. Ct. at 2547. After analogizing the concept of remoteness to the 'elusive' notion of proximate cause, he stated that Courts should 'look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under Section 4.' Id. at 2548." (App. A at 8a).

Judge Friendly then held that Crimpers easily complied with the two tests established by Mr. Justice Brennan in the following manner:

> "Crimpers easily surmounts the first hurdle. The alleged violations were defendants' conspiring to interpose barriers against direct dealings between the producers and the stations and attempting to monopolize the business of furnishing programs. Crimpers got in the way and defendants allegedly made it suffer for trying to do so. The second test is likewise satisfied. Defendants concede that their alleged activities were within the concern of Congress insofar as they adversely affected the producers or the stations. We see no reason why Congress, had it considered the matter, would not have been equally concerned with protecting a company like Crimpers which undertook to create a business that would have mitigated the precise injury, the limiting of dealings between producers and television stations to those conducted through HBO and Showtime, against which Congress meant to protect. Crimpers was not just a 'supplier' of a competitor, to whom standing is generally denied, see *2 Arceeda & Turner*, supra, Section 340 (e) at 217. It was endeavoring to forge a link in a chain of the sale of programming, to wit, direct contact between program producers and cable television stations, that would compete with defendants in their role as middlemen. The injury to Crimpers was not a 'remote' consequence of defendants' acts as would have been the case, for example, if the low prices allegedly paid by them had put a producer out of business and a supplier of the producer sued under Section 4. In such cases the injury to the supplier is simply a consequence of the injury to the producer; Crimpers' case is more like (although stronger than) a boycott of a supplier intended to further the conspirators' restraint of trade and stifling of competition." (App. A at 9a).

Judge Friendly also considered the factor of the indirectness or remoteness of Crimpers' injuries when measured against the same factor applied by this Court in *Associated General*. Although Judge Friendly recognized that direct dealing between producers and television stations would not necessarily take the form of patronizing Crimpers' trade show, Judge Friendly indicated that said issue would be a question of evidence and the amount of damages and is not a basis for dismissal of the complaint herein (App. at 13a).

There is no doubt but that Crimpers suffered the direct impact of the boycott of its show conducted by HBO and Showtime. Judge Friendly recognized this fact when he held that Crimpers "is not a 'remote' party but was the immediate object of defendants' boycott." (App. A at 13a).

It is, therefore, evident that Crimpers does satisfy the additional factor enunciated by *Associated General*, which is that the injuries suffered by Crimpers were directly related to the antitrust violations of HBO and Showtime.

D. Crimpers' damages are not speculative in nature.

A fourth factor considered by this Court in *Associated General* was the fact that the injuries sustained by the Union were speculative in nature. This Court stated on page 911 of its opinion in *Associated General* as to why said damages were extremely speculative as heretofore cited in the introductory portion of this point of this brief.

Both Judge Sand and Judge Friendly recognized that the damages sustained by Crimpers are easily ascertainable. (*See* App. B at 12b and App. A at 13a-14a).

Judge Friendly held that Crimpers was the immediate object of the boycott of HBO and Showtime. In fact, Judge Friendly held that the "producers and stations would be hard put to establish just what damage they had suffered from inability to participate in Crimpers' show" and that the damage claim of Crimpers is not speculative by reason of the fact that "its expenses in preparing CATEL are easily determinable, and its expected

profits from this and future shows should be provable under the liberal principles long recognized in antitrust cases." (App. A at 13a-14a). In fact, Judge Friendly referred the parties to the cases of *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S. Ct. 400, 405, 71 L. Ed. 684 (1927); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946); and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S. Ct. 1562, 1576-77, 23 L. Ed. 2d 129 (1969), in support of the fact that the profits earned by Crimpers from CATEL and future shows could be provable under the liberal principles long recognized in antitrust cases.

It is, therefore, evident that the damages sustained by Crimpers were not speculative as was in the case in the *Associated General* case.

E. Crimpers' claims do not present a risk of multiple recovery.

A fifth factor set forth by the Supreme Court in *Associated General* was the fact that the courts are desirous of avoiding duplicate recoveries on the one hand or the danger of complex apportionment of damages on the other. There is no question in the within case that there is no apportionment of damage problems or duplicate recovery problems.

Similarly, Crimpers is not asserting damage claims for injuries that duplicate those that might be claimed by the local cable company operators. However, HBO and Showtime are asserting that it is the local cable company operators that have standing to sue and the claim of HBO and Showtime is that Crimpers is asserting claims that pose a risk of multiple liability for one antitrust violation.

Moreover, the case at bar is distinguishable from those cases which deal with the factor of duplicate recoveries which are the *Associated General* case and the cases of *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977).

In the *Associated General* case, this Court noted on page 912 the following with respect to duplicate recoveries:

> "In this case, if the Union's Complaint asserts a claim for damages under Section 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities."

However, in the case at bar, no such problem of identifying damages or apportioning damages exists as Crimpers was the direct victim of the antitrust violations of HBO and Showtime.

In the *Hanover Shoe* case and the *Illinois Brick* case, the Courts were dealing with the unique area of price fixing and the fear that treble damages could be recovered by indirect purchasers who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. In the case at bar, Crimpers suffered a direct injury due to the desires of HBO and Showtime to destroy a trade show which did not adopt the policies and procedures of trade shows HBO and Showtime supported in the past in the Cable Television Industry and which HBO and Showtime feared would allow sellers of programming to congregate in an effort to sell their programming independently of HBO and Showtime.

Certainly, this factor is also to be determined from the fact that the issue of "standing" is "fact-sensitive." In the *Associated General* case, the Court was dealing with the uniqueness of a union and the vague injuries alleged by the Union. In the *Hanover Shoe* and *Illinois Brick* cases, the Courts were dealing with plaintiffs which were far removed in the chain of persons alleged to be damaged by the antitrust violations of the defendants in said cases.

However, in the within case, we are dealing with an entity which was directly injured by the actions of HBO and Showtime. Crimpers was no mere supplier or customer which existed many steps away from those persons who were directly injured by the acts of HBO and Showtime. Rather, Crimpers, as in the *McCready* case, was the direct means by which HBO and Showtime achieved their goal of restraining trade in the buying and selling of cable programming on a stand-alone basis.

The lower court determined that Crimpers satisfied the factor of double recovery enunciated by this Court in *Associated General* in the following manner:

> "We can see no danger of double recovery in recognizing Crimpers' standing. Crimpers' injury from having its trade show destroyed — the expenses incurred in preparing the show, the loss of reasonably anticipated profits from the show, perhaps even the loss of profits reasonably expected for the future is distinct and different from the losses of producers in getting too little for their programs or of cable television stations in paying too much. To be sure the case is unlike *McCready* in that the defendants here may have to pay Crimpers as well as the producers and the stations if they were to file suit and ultimately prevail, whereas the *McCready* defendants needed only to pay the plaintiff and her class, the psychologists having suffered no damage since the plaintiffs had continued to use them. But this means simply that if defendants had injured only the producers and the stations, the damages would have been less than if, in the course of their allegedly unlawful conduct, they also injured a company like Crimpers which was endeavoring to facilitate direct dealings between the two. This is not the kind of 'double recovery' which *Hawaii*[3] and *Illinois Brick* sought to prevent." (App. A at 7a-8a).

Therefore, it is respectfully submitted that the factor of duplicate recoveries, although applicable in a union or price fixing conspiracy case, is not applicable to the case at bar where there is no such risk of duplicate recovery.

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3. The Court was referring to the case of *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972).

F. Crimpers is the most logical plaintiff to bring a private suit.

HBO and Showtime argue in their brief that Crimpers is not the most logical plaintiff to bring a private suit, but that the local cable company operator is more clearly the person who is allegedly threatened by the violations alleged in the complaint herein.

As hereinbefore set forth, Crimpers was the victim of the conspiracy of HBO and Showtime and the antitrust violations they committed against Crimpers as alleged in the complaint.

HBO and Showtime are merely attempting to mislead this Court in creating an analogy between Crimpers and the Union in the *Associated General* case, which analogy cannot survive a careful analysis of the injuries allegedly suffered by the Union and Crimpers.

As stated by the *Associated General* Court, "the Union suffered unspecified injuries" (page 910) whereas Crimpers suffered in that its trade show was completely destroyed by the actions of Showtime and HBO. Simply stated, there were specific companies who had contracted to attend CATEL who decided instead to boycott it directly as a result of the actions of HBO and Showtime. On the other hand, in the *Associated General* case, the Union was not able to allege that any specific collective bargaining agreement was terminated, that the aggregate share of the contracting market controlled by Union firms was diminished, that the number of employed Union members had declined, or that the Union's revenues, in the form of dues or initiation fees, were decreased. *Id.* at 911. However, in the case at bar, Crimpers states that its revenue was substantially diminished by the actions of HBO and Showtime and that its trade show and its other business ventures were essentially destroyed by the antitrust violations herein.

For these reasons, it is respectfully submitted that Crimpers is the most logical plaintiff to bring the suit herein.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE *BICHAN, OSTROFE* AND *GAF* CASES WHICH ARE NOT APPLICABLE TO THE CASE AT BAR.

HBO and Showtime argue in their brief in support of the petition herein that the Second Circuit's decision below directly conflicts with the cases of *Bichan v. Chemetron Corp.* (In re Industrial Gas Antitrust Litigation), 681 F. 2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983), *GAF Corp. v. Circle Floor Co.*, 463 F. 2d 752 (2nd Cir. 1972), *cert. dismissed*, 412 U.S. 901 (1973) and *Ostrofe v. H.S. Crocker Co.*, 670 F. 2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983). The argument asserted by HBO and Showtime essentially is contradictory to the statements made by HBO and Showtime in their brief that an antitrust standing issue is to be governed solely by application of the factors enunciated by this Court in *Associated General*. No conflict has been created whatsoever by the ruling of the Second Circuit in the case at bar. Instead, the Second Circuit merely applied the factors set forth in *Associated General*. Judge Friendly recognized this fact when he indicated in his opinion that the proper method of analyzing a standing issue is not to look to the Second Circuit target area test but rather to analyze the issue of "standing" under Section 4 by using the *McCready* and *Associated General* opinions (App. A at 6a).

HBO and Showtime both recognize on page 15 of their brief in support of the within petition, that the *Bichan* decision involves a fact pattern virtually identical to that in *Ostrofe*, both of which are substantially different then the facts existing in the case at bar.

For these purposes, Crimpers shall analyze the *Bichan* case in order to exhibit that both *Bichan* and *Ostrofe* have no bearing on the issue of "standing" as it exists in the case at bar.

In the *Bichan* case, a former corporate president who was terminated by his former employer and blacklisted by the industry brought action against his former employer and other corporations in the industry seeking treble damages. The plaintiff in the *Bichan* case was a salaried executive who was terminated from his position

as president of one of the defendants and allegedly blacklisted by the industrial gas industry. The court held that said plaintiff was not within the target area of the alleged anti-competitive conduct and had not suffered an "antitrust injury."

The *Bichan* case must be looked at very carefully from the standpoint of an identification of the particular plaintiff in said case. Mr. Bichan was dismissed from his job and since the time of his dismissal was unable to secure similar work in the industry. By reason of said facts, Mr. Bichan commenced an antitrust action alleging that a conspiracy existed to fix prices, to compose conditions of sales on customers and to allocate customers. It is very clearly the case that Mr. Bichan was not the target of the conspiracy of the defendants in said case.

On the other hand, Crimpers was the direct target of the antitrust violations of HBO and Showtime in the case at bar. HBO and Showtime intended to destroy CATEL. Certainly, the conspiracy in the *Bichan* case was not aimed at *Bichan* in that it dealt with the fixing of prices, the imposition of conditions of sales on customers and the allocation of customers and *Bichan* was simply an employee for one of the entities involved in said conspiracy.

While Mr. Bichan did not suffer an antitrust injury, Crimpers clearly has suffered such an injury. While *Bichan* was not a target of the alleged conspiracy, it is clear that Crimpers was a target of the conspiracy of HBO and Showtime.

In fact, the court in the *Bichan* case at 681 F. 2d 518 stated that "the fact remains that the target area test requires that the injuries sustained flow from a lessening of competition in the marketplace" and that "the injuries Bichan has suffered did not derive from the lessening of competition in the industrial gas industries." Clearly, Crimpers' injuries resulted directly from a lessening of competition in the Cable Television Industry. HBO and Showtime stopped said competition by boycotting and causing a boycott of CATEL.

Therefore, it is evident that the *Bichan* case is definitely distinguishable from the case at bar, because said case involves

a situation where a former employee is suing to allegedly prevent an antitrust violation in the industry where he worked in the past. It is evident that said employee was not a "target" of the antitrust violations whereas Crimpers was a definite target of the antitrust violations of Showtime and HBO.

The court, in *Bichan*, clearly set forth their holding as dealing with an employee action rather than an action by a true target such as Crimpers when the court held at 681 F. 2d 519 that "we are convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion or discharge." In fact, the court went on to hold that a "mere relationship with the antitrust competitive scheme is insufficient to bring the injured party within the scope of Section 4; only where the injury is directly related to the scheme's anti-competitive effect does Section 4 apply." In the within case, Crimpers' injury is directly related to the scheme's anti-competitive effect.

The court further went on in the *Bichan* case to distinguish it from the Crimpers case when it held on pages 519-20 at 681 F. 2d that "as a general rule, stockholders, employees and creditors of an injured company and suppliers of an injured customer have all been denied recovery because their injuries were too 'indirect,' 'secondary,' or 'remote.' " *See Jeffrey v. Southwestern Bell*, 518 F. 2d 1129, 1131 (5th Cir. 1975).

The same analysis made herein with respect to *Bichan* would be applicable to the *Ostrofe* case wherein the plaintiff was a discharged employee who alleged that he had been boycotted by his employer and by other employers in the industry and further alleged that his discharge and the subsequent boycott resulted from his refusal to participate in an industry price-fixing and bid-rigging conspiracy.

The same analysis would apply to the *GAF* case.

Judge Friendly did not consider the *Bichan*, *Ostrofe* and *GAF* cases simply because of the fact that after *McCready* and *Associated General* were decided, "standing" issues are to be determined by applying the factors set forth therein.

Judge Friendly was merely following the mandates of *McCready* and *Associated General* in deciding the within case and fully recognized that issues regarding antitrust standing are fact-sensitive issues. Prior to *McCready* and *Associated General*, the courts always recognized that antitrust cases "must be carefully analyzed in terms of the particular factual matrix presented." *See Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F. 2d 501, 506 (3rd Cir. 1976). The antitrust violations of HBO and Showtime effectively destroyed Crimpers' trade show and its business of selling programming. Under the circumstances, Crimpers is one whose protection is the fundamental purpose of the antitrust laws and the factual matrix presented in the case at bar mandates this Court to deny the petition of HBO and Showtime. Simply speaking, the arguments of HBO and Showtime and the alleged analogies to the *Bichan, Ostrofe* and *GAF* case simply generalize too broadly from cases that are highly fact-sensitive.

It is, therefore, evident that the courts will determine the facts of each individual case and will not adopt any particular theory whether it be espoused in the *Calderone, Billy Baxter, Bichan, Ostrofe, GAF* or *Associated General* cases. In fact, notwithstanding said cases, the courts have held that recovery in cases similar to the case at bar should not be denied on some vague notion that "a line must be drawn." *See Congress Building Corp. v. Loew's, Inc.*, 246 F. 2d 587, 595 (7th Cir. 1957).

It is, therefore, evident that the argument made by HBO and Showtime that the decision below conflicts with *Bichan* and *Ostrofe* is an empty argument which can be given no credence whatsoever particularly in light of the fact that it contradicts the other arguments contained in the brief of HBO and Showtime which allege that it is only the factors enunciated in *Associated General* which should be used to determine whether or not antitrust standing exists at all.

It is for these reasons that the further argument made by HBO and Showtime that the ruling below threatens to frustrate this Court's efforts to bring order to antitrust standing law is a weak argument.

CONCLUSION

A review of the decision below will reveal that Judge Friendly analyzed and applied each and every factor enunciated by this Court in *Associated General* in determining whether or not standing exists in the case at bar.

As hereinbefore set forth when said factors were analyzed in this brief, said analysis by Judge Friendly was appropriate and proper under the circumstances existing herein.

For the foregoing reasons, the petition for a writ of certiorari filed by HBO and Showtime should be denied in its entirety with costs.

Respectfully submitted,

JERRY I. LEFKOWITZ
Attorney for Respondent